

Banking exemption No. 1 of 2018

EXPLANATORY STATEMENT

Prepared by the Australian Prudential Regulation Authority (APRA)

Banking Act 1959, section 11

Under subsection 11(1) of the *Banking Act 1959* (the Act), APRA may, in writing, determine that any or all of the provisions of the Act referred to in paragraphs 11(1)(a) to (e) of the Act do not apply to a person while the determination is in force.

On 21 March 2018, APRA made Banking exemption No.1 of 2018 (the instrument) which replaces Banking (Exemption) Order No. 82 made on 23 September 1996 (the 1996 Exemption).

The instrument commences on the date it is registered on the Federal Register of legislation (FRL).

1. Background

Under section 66 of the Banking Act, it is an offence for a person to carry on a financial business, whether or not in Australia, and assume or use, in Australia, a restricted word or expression in relation to that financial business, except where subsection 66(1AB) or subsection 66(1AC) allows the assumption or use of that word or expression, or APRA consents to the assumption or use of that word or expression, or where there is a determination in force under section 11 that section 66 does not apply to the person. Restricted word or exemption relevantly includes the terms “bank”, “banker” and “banking”.

The 1996 Exemption determined that foreign corporations, authorised as banks in their home countries, that raise funds in the Australian wholesale capital markets by way of issuing securities, are exempt from section 66 of the Act, provided that they comply with the conditions specified in paragraph 4 of that determination. Those conditions were that:

- securities offered and/or traded are in parcels of not less than A\$500,000; and
- it is clearly stated on the securities and any related information memoranda that the securities are being issued by an entity that is not authorized under the Act.

The 1996 Exemption would have been repealed on 1 April 2018 by operation of section 50 of the *Legislation Act 2003*. Under subsection 50(1) of the *Legislation Act 2003*, a legislative instrument registered after 1 January 2005 will sunset on the earlier of 1 April or 1 October, 10 years after the instrument was registered on the FRL.

2. Purpose and function of the instrument

The purpose of the instrument is to continue the exemption under section 66 of the Act. The conditions contained in the 1996 Exemption have been continued with some minor modifications which clarify the status of these foreign corporations and reflect the

introduction of the Financial Claims Scheme provisions in the Act. In addition, the form of disclosure has been updated to reflect the wider forms of communications now used in Australian wholesale capital markets for marketing and issuance of securities.

The conditions require disclosure that:

- the securities are issued by an entity that is not authorised under the Act and that is not supervised by APRA; and
- investments in securities issued by the entity are not covered by the depositor protection provisions in the Act and do not entitle holders of the securities to claim under *Division 2AA - Financial claims schemes for account-holders with insolvent ADIs* in the Act.

APRA conducted an assessment of the effectiveness and efficiency of continuing the 1996 Exemption. APRA concluded it was appropriate that the 1996 Exemption be remade without substantive amendment.

3. Consultation

The instrument does not substantially alter existing arrangements. Consequently, APRA did not consult externally in relation to the instrument.

4. Regulation Impact Statement

The Office of Best Practice Regulation has advised that a Regulation Impact Statement is not required for the Instrument.

5. Statement of compatibility prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

A statement of compatibility prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* is provided at Attachment A to this Explanatory Statement.

Attachment A

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

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This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (HRPS Act).

Overview of the Legislative Instrument

This Legislative Instrument revokes Banking (Exemption) Order No. 82 of 23 September 1996 (the 1996 Exemption) and remakes the 1996 Exemption without substantive change.

This Legislative Instrument is made for the purpose of exempting foreign corporations, authorised as banks in their home country, that issue securities in the Australian wholesale capital markets, from section 66 of the *Banking Act 1959*. This relevantly permits the foreign corporations to use the terms “bank”, “banker” and “banking” in relation to the issue of securities. The exemption is subject to conditions which:

- limit the issue of securities to amounts of \$500,000 or greater; and
- prescribe the form and manner of disclosures associated with the issue of securities.

Human rights implications

APRA has assessed the instrument and is of the view that it does not engage any of the applicable rights or freedoms recognised or declared in the international instruments listed in section 3 of the HRPS Act. Accordingly, in APRA’s assessment, the instrument is compatible with human rights.

Conclusion

These Legislative Instrument is compatible with human rights as they do not raise any human rights issues.